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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 414

TOM S. BUMGARNER, ET AL.,
Petitioners,

VERSUS

JOE BROWN COMPANY, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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July, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0090

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1. This case has been reported in *Bumgarner* v. *Joe Brown Company*, 376 F.2d 749 (10th Cir. 1967). See appendix i-iv for the text of the court's opinion.

2. Petitioners bring this action to recover from respondent unpaid overtime compensation due to the petitioners under the provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, as amended 63 Stat. 910, U.S.C., Title 29, § 201 *et seq.*). Jurisdiction of this action is conferred upon the Court by § 16(b) of the Fair Labor Standards Act [29 U.S.C. § 216(b) Vol. 7 p. 6372, 28 U.S.C. §§ 1337 Vol. 7 p. 5967 and 1345 Vol. 7 p. 5969]. Summary judgment was rendered by the United States District Court for the Eastern District of Oklahoma in favor of the respondent on March 10, 1966, which was

affirmed by the United States Court of Appeals, 10th Circuit, in the March term of 1967, and was filed by that court on April 24, 1967. See appendix for the text of the above cited statutes and court orders and opinions. The United States Supreme Court has jurisdiction of this cause by virtue of the provisions of 28 U.S.C. § 2101(c). See appendix for the text of the statute.

3. Questions for consideration by this Court are:

   A. Whether there was any genuine issue of material fact before the United States District Court for the Eastern District of Oklahoma.

   B. Whether petitioners were exempt from the overtime compensation provision of § 7 of the Fair Labor Standards Act, 29 U.S.C. § 207, by virtue of 29 U.S.C. § 213(b)(1).

4. The statutes governing this case are:

   A. 29 U.S.C. § 207, Vol. 7, p. 6317;

   B. 29 U.S.C. § 213(b)(1), Vol. 7, p. 6324;

   C. 49 U.S.C. § 304, Vol. 10, p. 9233;

   D. 29 U.S.C. § 202, Vol. 7, p. 6310.

   See appendix for the text of the above cited statutes.

5. The facts in this case are that petitioners were employed as truck drivers for the respondent at various times during each work week between April 1, 1963, and October 31, 1964.

(a) Respondent Joe Brown Company, Inc., employed petitioners as truck drivers during each work week as follows, to-wit: Tom S. Bumgarner, between April, 1963 and October, 1964; Jacky W. Casey, between July, 1963 and

October, 1964; Jerry D. Casey, between April, 1964 and October, 1964; Danny T. Chronister, between April, 1963 and April, 1964; Don Helton, between August, 1963 and October, 1964; Jimmy D. King, between April, 1963 and October, 1964; Bill Roper, between April, 1963 and October, 1964; Homer M. Teffertiller, between May, 1963 and October, 1964; Marvin L. Vernon, between April, 1963 and October, 1964; J. C. Warren, between April, 1963 and October, 1964; John T. Tulley, between July, 1963 and October, 1964; Douglas Wood, between April, 1963 and December, 1963; Edward W. Wells, between April, 1963 and October, 1964. Throughout the period of their employment, as aforesaid, petitioners were regularly and customarily engaged in the receiving, handling, shipping, billing, recording, production, transportation and delivery of material which was used in interstate commerce within the meaning of the Fair Labor Standards Act.

(b) During each of the work weeks within said period, respondent employed the petitioners in the shipping, production, delivery and transportation of material which was used in interstate commerce within the meaning of the Fair Labor Standards Act for work weeks longer than forty hours, and failed and refused to compensate petitioners for such employment in excess of 40 hours in such work weeks at a rate of not less than one and one-half (1½) times the regular rate at which they were employed, contrary to Section 7 of the Fair Labor Sandards Act.

(c) As a result of said violations of Section 7 of the Fair Labor Standards Act by respondent, there is due and owing from the respondent the following sums, to-wit: To

Thomas S. Bumgarner, the sum of $1,640; to Jacky W. Casey, the sum of $1,060; to Jerry D. Casey, the sum of $502; to Danny T. Chronister, the sum of $920; to Don Helton, the sum of $1,052; to Jimmy D. King, the sum of $1,460; to Bill Roper, the sum of $1,250; to Homer M. Teffertiller, the sum of $1,243; to John T. Tulley, the sum of $1,147; to Marvin L. Vernon, the sum of $1,440; to J. C. Warren, the sum of $1,300; to Douglas Wood, the sum of $530; to Edward W. Wells, the sum of $1,430, which amount has been demanded of the respondent and remains unpaid.

6. Petitioners filed their first amended complaint setting forth their claims with the United States District Court for the Eastern District of Oklahoma on November 30, 1965. On March 10, 1966, the District Court sustained respondent's motion for summary judgment and petitioners appealed to the United States Circuit Court of Appeals for the 10th Circuit which sustained the ruling of the District Court.

7. Jurisdiction was conferred upon the United States District Court for the Eastern District of Oklahoma by Section 16(b) of the Fair Labor St ndards Act [29 U.S.C. § 216(b)] and by 28 U.S.C. §§ 1337 and 1345.

ARGUMENT

PROPOSITION I

THE JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS SUSTAINING THE DECISION OF THE DISTRICT COURT GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IS ERRONEOUS BECAUSE THERE IS A GENUINE ISSUE AS TO A MATERIAL FACT.

A summary judgment may only be granted in favor of one party when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A. Since the petitioners have denied under Rule 56(f) the facts as set forth in respondent's affidavit in support of defendant's Motion for New Trial, there is a genuine issue as to a material fact and respondent's Motion for Summary Judgment should have been denied. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 71 L.Ed.2d 458, 82 S.Ct. 486.

PROPOSITION II

THE PETITIONERS ARE ENTITLED TO OVERTIME COMPENSATION UNDER THE PROVISIONS OF SECTION 7 OF THE FAIR LABOR STANDARDS ACT 29 U.S.C. § 207.

Apart from 29 U.S.C. § 213(b)(1), it is clear that petitioners are subject to the wage and hour provisions of the Act. Therefore the question is whether the exemption relied upon by respondent is applicable to the present case.

A.

The construction placed upon legislation by courts should give effect to the intent of Congress. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 84 L.Ed. 1345,

60 S.Ct. 1059 (1940). The Fair Labor Standards Act was designed to extend the frontiers of social process by insuring to all able-bodied working men and women a fair day's pay for a fair day's work, and any exemption from such humanitarian and remedial legislation must be narrowly construed. We are dealing with legislation that is dedicated to the proposition that laboring men are to be treated as something more than chattels. Justice Murphy dissenting in *Morris* v. *McComb*, 332 U.S. 422 (1947).

Any exemptions, including exemptions concerning the payment of overtime compensation, from humanitarian and remedial legislation such as the Act, must be narrowly construed against the employer, giving due regard to the plain meaning of the statutory language and the intent of Congress. *A. H. Phillips, Inc.* v. *Walling*, 325 U.S. 490, 493, 89 L.Ed. 1095, 1098, 65 S.Ct. 807, 157 A.L.R. 876; *O'Meara-Sterling* v. *Mitchell*, 299 F.2d 401-403 (5th Cir. 1962); *Mitchell* v. *Stinson*, 217 F.2d 210, 214 (1st Cir. 1954); *Tobin* v. *Johnson*, 198 F.2d 130, 133 (1952), *cert. denied* 73 S.Ct. 726, 345 U.S. 915, 97 L.Ed. 1349 (1953). Therefore, the exemption relied upon by defendant under Title 29 U.S.C.A. § 213(b)(1) must be plain and unmistakable, giving due regard to the rule that exemptions from the operation of humanitarian legislation are to be narrowly construed against the employer. Also, see 29 U.S.C. § 202, Vol. 7, p. 6310, which expresses the Congressional intent in passing the Fair Labor Standards Act.

B.

It is not clear, nor plain, nor unmistakable that the exemption under 29 U.S.C.A. § 213(b)(1) should be applied

in this case. On the other hand, the said exemption should not be applied in the present controversy because the petitioners' activities do not affect the safety of operation of motor vehicles engaged in interstate commerce. These facts were never demonstrated by the respondent. The Interstate Commerce Commission's power, under 49 U.S.C. § 304(a) is confined to regulation of transportation in interstate and foreign commerce, and its jurisdiction over employees' activities is limited to those which affect the safety of operation of motor vehicles engaged in such transportation. Justice Murphy dissenting in *Morris* v. *McComb, supra,* and *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 84 L.Ed. 1345, 60 S.Ct. 1059 (1940). When 29 U.S.C.A. § 213(b)(1) speaks of those over whom the Interstate Commerce Commission has "power," it means those who perform at least substantial amounts of activities within the Commission's jurisdiction. Congress was not concerned with insignificant conflicts between the Fair Labor Standards Act regulations and the Interstate Commerce Commission regulations. Nor was it desirous of leaving unregulated nearly all of the working time of those who are engaged in the production of goods for commerce but who spend infinitesimal amounts of time directly in interstate transportation. Justice Murphy's dissent in *Morris* v. *McComb, supra.*

In support of his position, respondent in arguing this cause to the United States Court of Appeals, 10th Circuit, relied upon the case of *Morris* v. *McComb, supra,* which petitioners contend is not controlling in the present controversy. In *Morris* v. *McComb* the Court found that the exemption under 49 U.S.C. § 304 was applicable because

the individual drivers, who were plaintiffs, spend approximately 4 per cent of *their* time and efforts in interstate commerce. No mention was made by the respondent in the present controversy at any time of how much time, if any, was spent in interstate transportation by the individual petitioners herein, so as to bring the case within the ruling of *Morris* v. *McComb, supra.* The only fact mentioned by respondent was that more than 4 per cent of respondent's revenues were derived from transportation as a common carrier in interstate commerce.

Therefore, petitioners contend that the United States Supreme Court is presented with the question which has not been, but should be, settled by the Supreme Court. Petitioners also contend that the United States Court of Appeals, Tenth Circuit, has misconstrued the Supreme Court's ruling in *Morris* v. *McComb, supra.*

Petitioners further contend that the majority decision in *Morris* v. *McComb, supra,* was incorrectly decided and is contrary to the intent of Congress in passing the Fair Labor Standards Act as set forth above, and in support thereof, cite the dissenting opinion of Justice Murphy in *Morris* v. *McComb, supra.*

In summary, the United States Court of Appeals erred in sustaining the decision of the District Court which granted respondent's Motion for Summary Judgment because there is no statutory authority allowing a Motion for Summary Judgment when there is a genuine issue as to a material fact.

To hold that the petitioners were exempt from overtime compensation under the Act would be to ignore the

principal that the construction placed upon legislation by courts should give effect to the intent of Congress.

Respectfully submitted,

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